IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

C.R.P.(PD).No.912 of 2006
and M.P.No.1 of 2006

1. Visalakshi Ammal
2. Ganesh
3. Senthil Alias Senthil Murugan ... Petitioners(Defendants 1,3 & 4)

Vs.

1. Pormannan alias Raja
2. Uma ... Respondents (Plaintiff and 2nd Defendant)

PRAYER : Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 23.01.2006 and made in I.A.No.2 of 2006 in O.S.No.132 of 2004, on the file of District Judge (Training) and Additional Sub Judge II, Thiruvanamalai.

For Petitioners : Mr.V.Balasubramanian
For Respondents : Ms.P.T.Asha for Sarvabhauman Associates

O R D E R

The defendants 1, 3 and 4 are the revision petitioners and the revision is filed under Article 227 of the Constitution of India. The plaintiff filed the suit in O.S.No.132 of 2004 on the file of the District Judge (Training) and Additional Sub-Judge II, Thiruvanamalai for specific performance of a registered sale agreement dated 29.05.2003, stated to have been entered between plaintiff and defendants and also directing the defendants to receive the balance of Rs.12,984/- and execute the sale deed, apart from delivery of possession also alternatively for refund of Rs.4 lakhs with the interest of 12% per annum, stated to have been received by the defendants under the registered sale agreement dated 29.05.2003 etc.

2. The defendants have filed the written statement denying the execution of the sale agreement with free consent and stating that taking advantage of old age of the first plaintiff such signatures were obtained. The plaintiff has filed I.A.No.2 of 2006 in the said suit under order 26 Rule 9 r/w 151 of Code of Civil Procedure for appointment of an Advocate

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Commissioner to inspect and measure the suit property with the help of the surveyor and submit a report with rough plan and survey plan and certificate of surveyor with regard to the extent available. For filing the said petition the plaintiff has given the reason that even though the sale agreement mentions the total extent of the property 2622 sq.ft., as on date the said extent is not available and only 1444 sq.ft. measuring East-west 74 ft. and North-south 19 ft. is available. The plaintiff also would further state that in the suit he has restricted his prayer only in respect of the available extent for the proportionate consideration, since the defendants have denied the execution, the Advocate Commissioner must be appointed to measure the suit property mainly with regard to the extent available.

3. On the other hand, the respondents in the I.A. who are the revision petitioners have filed the counter affidavit stating that when the execution itself is denied, filing of such application is premature and appointment of such Advocate Commissioner at this stage will only prejudge the issue. The Trial Court has allowed the petition against which the defendants have filed the present revision under Article 227 of the Constitution of India. A perusal of the order passed by the Trial Court in allowing the application would show that the admitted case of the plaintiff is that when the agreement was entered, the said document wherein the sale consideration was stated as Rs.7,15,000/- contained extent as 2622 sq.ft. and at present it is only 1444 sq.ft., which is available and therefore, the petitioners are entitled to pay proportionate consideration and it was on that basis the suit is filed and it is only to prove the discrepancy between sale agreement and the extent available the Advocate Commissioner is sought to be appointed and the court has allowed the application on the ground that to prove the discrepancy in measurement, the appointment of Advocate Commissioner is necessary.

4. The learned counsel for the petitioners would submit that when the issue involved in the case is as to whether the agreement dated 29.05.2003 has been actually entered with free consent or not, is a matter to be decided and therefore, when the execution of the agreement itself is question, the appointment of Advocate Commissioner to measure the property will not only prejudge the issue but it is only intended to threaten the defendants to come for a term.

5. He would also further strenuously contend that when the plaintiff himself has come forward that there is in existence only 1444 sq.ft. of land and on that basis the suit has been filed, there is absolutely no necessity for appointment of an Advocate Commissioner to measure the same, for, it is for the plaintiff to prove his case independently and for proving the plaintiff’s case the Advocate Commissioner cannot be appointed.

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6. On the other hand, the learned counsel appearing for the respondents / plaintiffs would submit that by appointment of the Advocate Commissioner no prejudice is going to be caused to the defendants and mere appointment of Advocate Commissioner will not amount to prejudging the issue.

7. I have heard the learned counsel for the petitioners as well as the respondents and perused the order passed by the learned Trial Judge.

8. Order 26 Rule 9 Code of Civil Procedure, which enables the court to issue commission to make local investigations in cases where any dispute has been raised and to elucidate the same, ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits. The said provision runs as follows:

> "9. Commissions to make local investigations.- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:
>
> Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

9. Considering the factual situation in this case, if at all there is any necessity on the part of the court to issue Commission for local investigation for the purpose of measurement of the property that can only arise under caption "for the purpose of elucidating any matter in dispute" in the context of the specific averment, referred to the pleadings by the plaint. Even before that a reference to the suit notice issued on behalf of the plaintiff shows that when the plaintiff has made a measurement on 10.11.2003 only 1444 sq.ft. was available and therefore, it is the specific case of the plaintiff even in the suit notice that the plaintiff is liable to pay only proportionate amount, since the agreement contains larger extent.

10. On the other hand in the reply notice as given on behalf of the defendants, who are the revision petitioners totally denying the execution as well as the receipt of any amount and it is the specific case that the defendants that they were kidnapped and forced and one of the defendants was physically handicapped and by force they were made to sign before the Sub-Registrar Office on 29.05.2003 and in the reply notice also the defendants have not raised any objection about the extent of the land. Likewise, the same was seen in the plaint filed by the plaintiff and in the written statement filed by the defendants also. The point raised was

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relating to the execution of the dispute regarding the sale agreement and nothing about the extent. Even in the counter affidavit filed in the Interlocutory Application on behalf of the defendants, who were the respondents in the I.A., the only dispute raised was about the existence of the agreement itself and there is no dispute about the extent of the property shown. In such circumstances, I do not see any reason for the Trial Court to come to the conclusion as if the local investigation for measurement of the property by Advocate Commissioner is necessary to prove the discrepancy.

11. In the context of the stand taken by the defendants as if the agreement was entered by force by kidnapping, etc., by means of kanthuvati persons, there is certainly a substance in the arguments advanced by the learned counsel for the petitioners that the purpose of appointment of Advocate Commissioner at this stage to go to the spot and measure is only to indirectly threaten the defendants to come to any terms with the plaintiff. The reason given by the learned Trial Judge that appointment of Advocate Commissioner will not prejudge the issue is in my considered view not a correct approach.

12. In any event in a suit for specific performance, it is for the plaintiff to prove as to whether the agreement which is the basis for the suit is enforceable at law, apart from the fact as to whether the plaintiff was willing to perform his part of obligation and the defendants were not willing to do the same, in spite of the plaintiff willingness and so many other factors are to be proved.

13. Therefore, it is clear that appointment of an Advocate Commissioner at this stage is only premature and un-called for. In view of the same the order passed by the learned Trial Judge in I.A.No.2 of 2006 in O.S.No.132 of 2004 dated 23.01.2006 is set aside with a direction to the Trial Court to proceed with the trial and dispose the suit expeditiously. The Civil Revision Petition stands allowed. No Costs. Consequently, connected C.M.P.is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The District Judge (Training)
Additional Subordinate Judge II,
Tiruvannamalai.

2. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.V.Balasubramanian, Advocate, SR.64782.
1 cc To M/.Sarvabhuaman Associates, Advocate, SR.64930.

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JRG(CO)
RVL 05.01.2007

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